Note on Counter-Terrorism and Sentencing Bill: Sentencing Reforms (2)

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Introduction

1. This is my second Note on the sentencing reforms in the Counter-Terrorism and Sentencing Bill introduced into Parliament on 20 May 2020. The first Note[1] considered the most striking changes: the introduction of serious terrorism sentences and the removal of the Parole Board's role for some of the most dangerous offenders.

2. The remaining proposed changes appear technical but are nonetheless significant to the management of terrorist offenders on release. These comprise: extending the potential scope of terrorist notification requirements; providing more and longer licences for dangerous terrorist offenders; extending the special custodial sentence for offenders of particular concern; and creating a new special offence for child terrorist offenders.

3. In addition, the Bill increases the maximum sentence for three terrorism offences and enables the use of polygraphs (lie-detectors) for terrorist offenders.

Terrorism Notification Requirements: Clauses 1, 44

4. The effect of the notification requirements under the Counter-Terrorism Act 2008 is summarised in my Terrorism Acts in 2018 Report[2].

5. Their ambit is extended in two ways.

6. Firstly, the proposals greatly increase the number of non-terrorist offences that can be found to have a terrorist connection, and therefore trigger the notification provisions. Currently only a range of specified offences can be found to have a terrorist connection, meaning that the sentencing judge is entitled to find that the offence is, or took place in the course of, an act of terrorism, or was committed for the purposes of terrorism[3]. Change is achieved by reversing the position: any offence which is punishable with imprisonment for more than 2 years can now be found to have a terrorist connection aside from listed offences[4].

7. Secondly, two offences which were previously not subject to notification provisions are brought within scope. These are breaches of TPIMs and breaches of Temporary Exclusion Orders[5]. Accordingly, committing these offences will give rise to notification requirements on release provided the individual receives a sentence of 12 months or more.

8. In the course of preparing my independent review of the Multi-Agency Public Protection Arrangements (MAPPA), it became apparent that the imposition, and monitoring by police, of notification requirements play a valuable role in assessing and managing the risk posed by terrorist offenders. The extension of notification to any terrorism-connected offence (a matter that must be judicially determined), plus these two breach offences, is beneficial.

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[1] https://terrorismlegislationreviewer.independent.gov.uk/note-1-on-terrorism-sentencing-reforms/.
[2] At 7.52 to 7.59: https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/03/Terrorism-Acts-in-2018-Report-1.pdf.
[3] Under section 30 and 93 Counter-Terrorism Act 2008.
[4] Clause 1 and Schedule A1, essentially offences which are already terrorist in nature.
[5] Clause 44.

More and Longer Licences for Certain Dangerous Terrorist Offenders: Clauses 15 to 20.

9. Aside from adding some miscellaneous security-type offences[6] to the list of offences for which an extended sentence may be passed, child and adult offenders who are convicted of the most serious terrorism and terrorism-connected offences[7] may now be subject to licences of a maximum of 10 years[8].

10. Eligible offenders include adults convicted of the most serious terrorism offences where the risk of multiple deaths condition is not satisfied, meaning they are not liable to a serious terrorism sentence (see Note 1), and children convicted of terrorist offences which did in fact risk multiple deaths, since children cannot receive serious terrorism sentences.

11. This is an increase from the previous maximum of 8 years, but the sentencing court will retain discretion (subject to a minimum of 12 months) over the total period of licence. Given the seriousness of some offending, and the enduring risk that some of these offenders are likely to present, an enhanced period of post-sentence monitoring will be justified for some offenders.

Extending the Special Custodial Sentence for Offenders of Particular Concern: Clauses 21, 23, 24.

12. The effect of these sentences is to ensure that terrorist offenders who are sentenced to determinate sentences (i.e. those who have not been found to be dangerous) are nonetheless subject to an additional licence period of at least one year following release[9].

13. Recent changes made by the Terrorist Offender (Restriction of Early Release) Act 2020 meant that standard determinate sentence prisoners might not be released until the expiry of their custodial term, giving rise to the possibility of a cliff-edge.

14. With some minor exceptions, this change ensures that the cliff-edge is not possible for anyone convicted of a terrorism or terrorism-connected offence, and is a sensible reform. Whilst it might be asked whether a one year extension is long enough, it should be recalled that a person serving a licence is liable to be recalled to serve out the remaining licence period in custody. Going beyond one year for offenders who have not been found to be dangerous risks distorting the proportionality of any sentence passed upon them.

Introduction of Special Sentence for Children: Clause 22

15. The introduction (by Clause 22) of a special sentence of detention for terrorist offenders of particular concern aged under 18 is also useful. It applies to offenders who have not been found to be dangerous, and should be considered in priority to Detention and Training Orders[10].

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[6] Relating to explosives, biological chemical and nuclear weapons, and aviation: Clause 15.
[7] Called "serious terrorism offences" and contained in Schedule 17A Criminal Justice Act 2003 as inserted by clause 2 and Schedule 2 to the Bill.
[8] Clause 18.
[9] As well as early release being subject to the Parole Board. See Note on Sentencing at paragraphs 15 to 18: https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/02/200207-Release-of-Terrorist-Offenders.pdf.
[10] See Explanatory Note 153 and paragraph 18 of Part 4 of Schedule 13, amending section 234(1)(c) Sentencing Act 2020.

16. The limited flexibility for release[11] and recall[12] for terrorist offenders subject to Detention and Training Orders, especially where they become more dangerous in detention[13], means that an alternative to this type of order is to be welcomed.

17. There is no mandatory minimum custodial term and therefore sentencing judges will be free to sentence in a way that is consistent with the principles that apply to sentencing children. The 12-month licence period avoids a cliff-edge on release.

Increased Maximum Sentences and Polygraphs: Clauses 26, 32 to 35

18. It is proposed to increase the maximum sentences (from 10 to 14 years) for membership of a proscribed organisation (section 11 Terrorism Act 2000), inviting or expressing support for a proscribed organisation (section 12 Terrorism Act 2000), and attendance at a place used for terrorist training (section 8 Terrorism Act 2006).

19. It is only very recently that the Counter-Terrorism and Border Security Act 2019 addressed the appropriate maximum sentences for terrorism offences, increasing the maximum sentences for 3 offences under the Terrorism Act 2000 and 2 offences under the Terrorism Act 2006[14], but not these offences.

20. Whilst providing additional headroom for sentencers dealing with worst type of these offences is always a temptation, most offenders are likely to fall somewhere below the highest sentencing bracket (for example, as an active but not prominent member of a proscribed organisation[15]). In these cases the effect of increasing the maximum sentence may be to pull up the sentence by several months to a year for less serious offenders. This raises the question of whether additional short periods of custody are beneficial in terms of protecting the public.

21. Published data do not show whether or not the most serious offenders for these offences tend to commit other more serious offences (in which case the increase in the maximum is unlikely to make any difference). Statistics do however show[16] that an offence contrary to section 11 to 13 (therefore including membership, and inviting support, as well as uniform/ flag offences, but not distinguishing between them) was the most serious (or principal) offence leading to a conviction in the year ending December 2018 on 12 occasions[17], but on zero occasions in the year ending December 2019. There was one offence relating to training for terrorism contrary to section 6 (where the maximum is life) *or* section 8 (the table does not distinguish) in the years ending 2018 and 2019.

Polygraphs: Clauses 32 to 35.

22. Judging terrorist risk presented by terrorist offenders is fraught for a variety of reasons. In particular, if an individual is convicted of a precursor offence such as gathering information likely to be useful to a terrorist as a means of disrupting a developing plot, the offence will not accurately reflect the risk presented; conversely, not everyone with an obsession with bomb-making manuals will go on to build a bomb. In addition, some of the predictive factors for general criminality (so-called

[11] *R (on the application of X) v Ealing Youth Court (sitting at Westminster Magistrates' Court)* [2020] EWHC 800 (Admin).
[12] Under section 104(1) and (2) Power of the Criminal Courts (Sentencing) Act 2000.
[13] As illustrated by the *Ealing Youth Court* case, supra.
[14] Section 7.
[15] https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/proscribed-organisations-membership/.
[16] https://www.gov.uk/government/statistics/operation-of-police-powers-under-the-terrorism-act-2000-quarterly-update-to-december-2019. Annual data table at C:03.
[17] Reflecting the prosecution of National Action members in 2018.

crimogenic factors, such as the lack of employment) do not apply as clearly for terrorist risk, and the data on terrorist reengagement is too limited to construct actuarial tools.

23. In the course of my independent MAPPA review (now the subject of a final report but awaiting publication) I therefore concluded that polygraph testing is likely to be a valuable additional means of gathering information relevant to terrorist risk for terrorist offenders on licence. It has been used by the probation service for sex offenders since 2009, initially as a pilot, and since 2014 throughout England and Wales[18]. There is detailed published guidance on how polygraph testing is actually used in practice[19].

24. The ways in which polygraph testing is used in practice against terrorist offenders is important, but not addressed in the Bill. For example, clarity will be needed over whether polygraph testing is mainly for those who are assessed as very high or high risk, or whether it is intended to see if apparently low risk offenders are fooling the system.

25. The effect of the amendments will be that statements made while participating in the polygraph session, and any physiological reactions during the polygraph examination are currently excluded from use in criminal proceedings against that individual[20]. This leaves unaddressed (and therefore appears to tolerate) their possible use in TPIM proceedings. Whilst the purpose of testing is to monitor the person's compliance with the other conditions of their licence or to improve the way in which they are managed during their release on licence[21], the use of statements for the purpose of making a TPIM is not expressly excluded. Unless addressed in the legislation, there is therefore the prospect of individuals making statements in the course of compulsory polygraph testing which are then used to secure a TPIM following the ending of their licence. This is a potentially oppressive consequence which may not be intended.

26. Because, unlike with sex offenders, the use of polygraphs for terrorist offenders will not have been piloted beforehand, there is a strong case for thorough post-legislative scrutiny. The possibility that polygraph testing is less effective than seems likely, and the danger of over-reliance on it, need to be kept in mind.

4 June 2020

[18] Offender Management Act 2007, sections 28-30; Polygraph Rules 2009.
[19] https://www.justice.gov.uk/downloads/offenders/psipso/psi-2014/psi-36-2014-polygraph-examinations.pdf at paragraph 1.3. The application of the pilot scheme was challenged but upheld in *R (on the application of C) v Ministry of Justice* [2009] EWHC 2671 (Admin). For further background about the pilot study and evaluation, see http://www.legislation.gov.uk/uksi/2013/1963/pdfs/uksiem_20131963_en.pdf.
[20] Section 30 Offender Management Act 2007.
[21] Section 24A(2)(a) Offender Management Act 2007 as inserted by clause 34.